EXPLANATORY MEMORANDUM TO

THE TRIBUNAL PROCEDURE (AMENDMENT NO. 4) RULES 2013

2013 No. 2067 (L. 20)

THE FIRST-TIER TRIBUNAL AND UPPER TRIBUNAL (CHAMBERS) (AMENDMENT NO. 2) ORDER 2013

2013 No. 2068

AND

THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER) (JUDICIAL REVIEW) (ENGLAND AND WALES) FEES (AMENDMENT) ORDER 2013

2013 No. 2069

1. This explanatory memorandum has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instruments

2.1. **The Tribunal Procedure (Amendment No. 4) Rules 2013** ("the Rules") makes changes to:

- the Tribunal Procedure (Upper Tribunal) Rules 2008 as a consequence of the transfer of certain immigration and asylum judicial reviews from the High Court to the Upper Tribunal;
- the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 to deal with some practical issues raised by operational colleagues in Her Majesty's Courts and Tribunals Services (HMCTS); and
- the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 to correct a cross-reference error.

2.2. **The First-tier Tribunal and Upper Tribunal (Chambers) (Amendment No. 2) Order 2013** ("the Chambers Order") amends the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 to facilitate the transfer of the immigration and asylum judicial reviews from the High Court to the Upper Tribunal.

2.3. **Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) Fees (Amendment) Order 2013** ("the Fees Order") amends the Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011 to extend the prescribed fees to those immigration and asylum judicial reviews transferring from the High Court to the Upper Tribunal.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None

4. Legislative Context

4.1. Part 1 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") created a two-tier tribunal system into which existing tribunals can be transferred, or new appeal rights directed. Section 3 of the 2007 Act establishes the First-tier Tribunal and the Upper Tribunal, which together make up this two-tier system. Both tribunals are divided into chambers which deal with different areas of jurisdiction eg health, immigration and asylum, and education. In addition to statutory appeals, the Upper Tribunal may also deal with certain kinds of judicial reviews.

4.2. Section 22 of the 2007 Act provides for Tribunal Procedure Rules to be made, governing the practice and procedure to be followed in the First-tier Tribunal and Upper Tribunal. It also provides for the rules to be made by the Tribunal Procedure Committee ("TPC"). Schedule 5 to the 2007 Act makes provision for the process of making the rules, and the content of those rules.

4.3. Section 7(9) of the 2007 Act provides that the Lord Chancellor may by order, with the concurrence of the Senior President of Tribunals, organise the two Tribunals into Chambers and specify the allocation of functions between their Chambers.

4.4. Section 42 of the 2007 Act provides that the Lord Chancellor may by order, after consulting with the Senior President of Tribunals and with the concurrence of Her Majesty's Treasury ("HMT"), prescribe fees payable in respect of anything dealt with by the Upper Tribunal.

5. Territorial Extent and Application

5.1. The Rules and Chambers Order extends to the UK. The Fees Order extends to England and Wales.

6. European Convention on Human Rights

6.1. As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- ***What is being done and why***

7.1. The Rules, the Chambers Order and the Fees Order make amendments that are consequential to the making of a direction by the Lord Chief Justice of England and Wales to transfer into the Upper Tribunal certain immigration and asylum judicial review from the High Court. The Rules makes further amendments to deal with some practical issues that have been brought to the attention of the TPC by operational colleagues in HMCTS and to correct a cross-referencing error.

Amendments to the Upper Tribunal Rules

7.2. The Rules amend the Upper Tribunal Rules 2008 that are applied in the Immigration and Asylum Chamber when dealing with judicial reviews.

7.3. Presently the First-tier Tribunal and Upper Tribunal Immigration and Asylum Chambers deal with appeals against Government decisions in the area of immigration,

asylum and nationality. The Upper Tribunal also hears judicial review applications but only in relation to 'fresh claim judicial review' proceedings.

7.4. Section 22 of Crime and Courts Act 2013 amends the law governing transfers of immigration and asylum judicial reviews to the Upper Tribunal as provided for in section 31A of the Senior Courts Act 1981. When section 22 is brought into force on 1 November 2013, the powers of the High Court in England and Wales to transfer judicial reviews in immigration and asylum cases will be the same as for those in other areas. Cases which fall within a class specified for the purposes of section 18(6) of the 2007 Act in a direction of the Lord Chief Justice of England and Wales (made in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005) must be transferred to the Upper Tribunal (as per section 31A(2) of the Senior Courts Act 1981). In other cases the High Court may transfer the case if it considers that just and convenient (section 31A(3) of the Senior Courts Act 1981). Section 22 also makes changes to the rules for transfers to the Upper Tribunal from the Court of Session in Scotland and from the High Court of Northern Ireland to the Upper Tribunal.

7.5. On commencement of section 22, a new direction of the Lord Chief Justice of England and Wales will come into effect, specifying a wide class of immigration and asylum judicial review applications that must be transferred to the Upper Tribunal.

7.6. In Scotland and Northern Ireland a similar direction (or in the case of Scotland, Act of Sederunt) will not be made and the current approach will continue as it is, with these judicial reviews being dealt with by the Court of Session, or the High Court of Northern Ireland, respectively.

7.7. The Rules make amendments to the Upper Tribunal Rules 2008 to extend the current provisions that apply to 'fresh claim judicial reviews' to this new class of 'immigration judicial reviews'. The amendments seek to mirror the procedure applicable in the High Court as closely as possible and accordingly provide that permission to appeal Upper Tribunal decisions in relation to immigration judicial reviews will be dealt with at the hearing giving the decision. In addition, in relation to immigration judicial review proceedings only, a party will no longer be able to request that a decision refusing permission to bring the application be reconsidered at an oral hearing, where the application has been certified by the judge as being totally without merit. A transitional provision means that this amendment will not apply to 'fresh claim judicial review' applications issued in, or transferred to, the Upper Tribunal prior to 1st November 2013. The Tribunal has also been given a strike out power where a relevant fee as not been paid.

Amendments to the Social Entitlement Chamber Rules

Confidentiality

7.8. From 28 October, appeals against many social security and child support decisions will be lodged directly with the First-tier Tribunal, rather than the Department for Work and Pensions (DWP). The changes made to rule 19 direct parties to provide notice of confidentiality to the First-tier Tribunal together with the appeal notice, and enable the Tribunal to make enquiries regarding confidentiality if the position is not clear when the appeal notice is lodged.

Child Benefit and Guardian Allowance

7.9. This amendment, in the light of the Upper Tribunal decision in JI v. HMRC link, ensures that the First-tier Tribunal is able to exercise its case management powers to extend the initial time limit for bringing an appeal against a decision in respect of a claim for child benefit and guardian's allowance, as provided by regulation 28 of the

Child Benefit and Guardian's Allowance (Decisions and Appeals) Regulation 2003 (S.I. 2003/916), subject to the absolute time limit provided by the rules.

Amendments to the War Pensions and Armed Forces Compensation Chamber Rules

7.10. The amendment to the War Pensions and Armed Forced Compensation Chamber Rules corrects a cross-reference to the rule under which case management directions may be given to deal with an issue in proceedings as a preliminary issue.

Chambers (Amendment No. 2) Order 2013

7.11. The Chambers Order amends article 11 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010, to provide that all immigration judicial reviews are allocated to the Immigration and Asylum Chamber of the Upper Tribunal. This has been done by reference to the judicial reviews as 'immigration matters' in the Lord Chief Justice's new direction. It is expected that any immigration or asylum judicial reviews transferred to the Upper Tribunal by the High Court on an ad hoc basis will also be designated as an "immigration matter" and thereby allocated to the Immigration and Asylum Chamber of the Upper Tribunal.

Fees (Amendment) Order 2013

7.12. The Fees Order amends the Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011 ("the 2011 Order"). The Fees Order ensures that the fees prescribed by the 2011 Order will extend to all immigration judicial reviews dealt with by the Upper Tribunal.

- ***Consolidation***

7.13. Consolidated versions of Tribunal Procedure Rules will be updated on the Justice website when this instrument comes into force. They can be found at: http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm

7.14. The Lord Chief Justice's Direction is available on the Judiciary web site at: http://www.judiciary.gov.uk/publications-and-reports/practice-directions.

8. Consultation outcome

Amendments to the Upper Tribunal Rules

8.1. During the Spring of 2012, the TPC ran a 6-week public consultation exercise on the proposed rule amendments required as a result of the transfer of the immigration and asylum judicial reviews to the Upper Tribunal entitled 'Consultation on amendments to Tribunal Procedure (Upper Tribunal) Rules 2008 arising from statutory changes to judicial review'. It closed on 20 June 2013. Stakeholders identified by the Home Office, HMCTS and judiciary most closely concerned with hearing such cases (including both the First-tier and Upper Tribunal IAC Chamber Presidents and the Lord President of Scotland) were also written to.

8.2. Six responses were received to the consultation. The TPC's Immigration and Asylum sub-group considered and discussed all the responses during the development stage of the Rules. The TPC and its sub-group met two times between June 2013 and July 2013 to consider the responses in detail and revised the Rules accordingly.

8.3. The issues raised by respondents, and the TPC's response, are set out in more detail in both the TPC's consultation document which can be found at: http://www.justice.gov.uk/about/tribunal-procedure-committee/ts-committee-closed-consultations and in the response document that will be published on the Committee's

website (http://www.justice.gov.uk/about/tribunal-procedure-committee) in the near future.

Amendments to the Social Entitlement Chamber Rules

8.4. In relation to 'confidentiality', colleagues in HMCTS raised this issue with the TPC who agreed that it was a required amendment. Accordingly, no formal consultation exercise was undertaken. However a paper was prepared and circulated to the Chamber President and the Lord President of Scotland.

8.5. No public consultation has been undertaken in relation to the extension of time limits in 'Child Benefit and Guardian's Allowance' cases, however MoJ engaged with lawyers in Her Majesty's Revenue and Customs (HMRC) on the amendments.

The Chambers Order and the Fees Order

8.6. No public consultation has been undertaken in relation to the amendments made by the Chambers Order and the Fees Order. The Chamber President was consulted during the development of the Chambers Order and the Senior President of Tribunals' consent was obtained. In relation to the Fees Order, the Senior President of Tribunals was consulted and the consent of HMT was obtained.

9. Guidance

9.1. HMCTS produce guidance for all tribunal jurisdictions which are routinely issued to appellants at key stages of the appeals process and are available on the HMCTS website.

9.2. The guidance is updated as required to reflect changes to procedure.

10. Impact

10.1. The impact on business, charities, voluntary bodies and the public sector is nil.

10.2. An impact assessment has not been prepared for this instrument. A Regulatory Impact Assessment (RIA) was prepared for the 2007 Act. This can be found at:
http://www.justice.gov.uk/publications/tribunalscourtsandenforcementact.htm
The RIA confirmed that the legislation would create a new flexible overarching statutory framework for tribunals, bringing tribunals together in one organisation. No additional costs have been identified from the setting up of the First-tier Tribunal and Upper Tribunal in the first 3 years and no further costs have been identified since to change this assumption.

11. Regulating small business

11.1. The legislation does not impact on small businesses.

12. Monitoring & review

12.1. The Ministry of Justice will keep the tribunal rules, the Chambers Order and the Fees Order continually under review.

13. Contact

13.1. Pushkar Kapole or Julie McCallen, at the TPC Secretariat,

(Pushkar.Kapole@Justice.gsi.gov.uk or Julie.Mcallen@justice.gsi.gov.uk) can answer any queries about this instrument.